

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of Michael Fiorito

SECOND PREHEARING ORDER

This matter came before Administrative Law Judge Eric L. Lipman upon the Department's Motion for Summary Disposition and Respondent's Motion to Compel the Production of Documents.

IT IS HEREBY ORDERED:

1. Unless the Respondent, Mr. Fiorito, files a Statement of Genuine Issues (or like document) on or before **4:30 p.m. on Tuesday, May 27, 2008**, the undersigned will proceed to act upon the Department's motion without further submissions from the Respondent. In any such Statement of Genuine Issues, Mr. Fiorito must set out specific facts showing that there is a genuine factual issue as to a claim of the Department that requires a hearing to resolve.
2. By **4:30 p.m. on Tuesday, May 27, 2008**, the Department will file a discovery log listing documents that are: (a) within the possession of the Minnesota Department of Commerce, or as to which the Department's counsel in this matter is otherwise aware; (b) not earlier disclosed to Mr. Fiorito, and (c) responsive to Mr. Fiorito's Requests for Production Numbers 2, 6, 7 and 8. The log shall likewise include a short summary of any objection the Department may have in disclosing any of the listed documents to Mr. Fiorito.

Dated: May 20, 2008.

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

I. The Department's Motion for Summary Disposition

Summary disposition is the administrative equivalent of summary judgment.¹ Summary disposition is appropriate when there is no genuine dispute as to the material facts of a contested case and one party necessarily prevails when the law is applied to those undisputed facts.²

The moving party carries the burden of proof and persuasion to establish that there are no genuine issues of material fact which would preclude disposition of the case as a matter of law.³ Further, when considering a motion for summary disposition, the tribunal must view the facts in the light most favorable to the non-moving party.⁴ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.

In order to defeat an otherwise proper motion for summary disposition, the non-moving party must show the existence of material facts that are genuinely disputed.⁵ A genuine issue is one that is not either a sham or frivolous and a material fact is a fact whose resolution will affect the result or outcome of the case.⁶

As part of its motion for summary disposition, the Department asserts that:

The undisputed facts establish that Respondent committed the violations set forth in the Amended Statement of Charges. Respondent has not and cannot dispute any of the following misconduct: (1) his multiple felony convictions, including the underlying acts of converting client fund/fraud, repeated threats of violence, multiple attempts to bribe a witness; (2) his failure to disclose his criminal history on his license application; (3) his failure to notify the Department regarding the additional criminal charges, guilty pleas, and/ convictions; and (4) his failure to satisfy judgments totaling \$28,528, relating to his failure to repay a loan and overstatement of a mortgage debt payoff amount.

¹ See, *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

² See, *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

³ See, *Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁴ See, *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. App. 1984).

⁵ See, *Murphy v. Country House, Inc.*, 240 N.W. 2d 507, 511-12 (Minn. 1976); *Borom v. City of St. Paul*, 184 N.W.2d 595, 597 (Minn. 1971).

⁶ See, e.g., *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

The Department's Memorandum in Support of Summary Disposition, at 5 (citations omitted). In order to avoid a grant of summary disposition, Respondent is directed to set forth specific facts which show that any or all of these claims of misconduct are genuinely disputed, and to file this listing by 4:30 p.m. on Tuesday, May 27, 2008.

II. The Department's Motion for Summary Disposition

Administrative Law Judges at the Office of Administrative Hearings "have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts."⁷ Both parties to contested case proceedings involving regulatory discipline are permitted to conduct discovery as to the issues and claims in the case and to gather potential impeachment evidence. Moreover, these purposes have been regarded as consistent with the Minnesota Administrative Procedure Act (APA) and the rules of the Office of Administrative Hearings.⁸

Because it is not at all clear from the Department's May 15, 2008 opposition papers whether documents that are responsive to Mr. Fiorito's Requests for Production Numbers 2, 6, 7 and 8 are known to Department officials, counsel for the Department is directed to submit a log listing any such documents and a summary of any objections it may have in disclosing these items to Mr. Fiorito

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⁷ See, *In the Matter of Superior Home Care*, OAH Docket No. 11-0900-11066-2 (1997) (citing G. Beck, L. Bakken & T. Muck, *Minnesota Administrative Procedure*, § 7.5.2 at 144 (1987)) (<http://www.oah.state.mn.us/aljBase/09001066.do.htm>).

⁸ *Id.*